UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RICKY LEE ENMAN,	)	
	)	
Petitioner	)	
	)	
v.	)	Civil No. 00-0043-B-C
	)	
STATE OF MAINE,	)	
	)	
Respondent	)	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

Petitioner has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner raises three grounds for relief, all of which were first cited in a state petition for post conviction review following Petitioner's guilty plea to one count of manslaughter in June, 1998.[1] Respondent has filed an Answer to the Petition in which it asserts that Petitioner's first ground was properly decided by the State court on the post-conviction petition, that the second ground was procedurally defaulted by Petitioner's voluntary dismissal of the ground during the state proceeding, and that the third ground raises only a state law issue, not cognizable on this Petition for Writ of Habeas Corpus. I will address each argument in turn.

Discussion

I . Ineffective assistance of counsel – sentence prediction

Petitioner's first allegation is that his attorney was ineffective because she misinformed Petitioner regarding the length of his sentence under the guilty plea. This ground was fully adjudicated in the state post-conviction proceeding. This Court is required to adhere to decisions

[1] Petitioner separates his claims into four separate grounds. A fair reading of the facts underlying grounds A and C reveal that they are actually both a claim that Petitioner's attorney misinformed him as to the likely sentence he would receive if he plead guilty.

rendered by State courts "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Here, there is no question that the law set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which governs Petitioner's claim, constitutes "clearly established Federal law" within the meaning of section 2254(d)(1). *Williams v. Taylor*, 120 S. Ct. 1495, 1512 (2000). The only remaining question is whether the State court decision was "contrary to, or involved an unreasonable application of" the *Strickland* ruling.

In order to prevail on his claim of ineffective assistance of counsel, Petitioner was required to show both that his attorney's performance was deficient, and that if it were not for that deficient performance, the outcome of the proceeding would have been different. *Id*. (citing *Strickland*, 466 U.S. at 688, 694). In the case of a guilty plea, the second prong requires Petitioner to satisfy the court that, but for counsel's deficient performance, he would likely have insisted on a trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), *cited in United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995).

The State court justice, after finding that Petitioner's counsel's performance was not deficient, noted that Petitioner did not testify during the State proceeding that he would have proceeded to trial if he had known the ultimate sentence he would receive.[2] Dec. on Post Conv. Rev. at 3 (Oct. 29, 1999). This factor alone is clearly fatal to his claim. *Hill*, 474 U.S. at 59.

[2] As Respondent notes, Petitioner has also made no such allegation before this Court.

The justice further cited a First Circuit Court of Appeals decision to the effect that an attorney's inadequate sentencing prediction will not, standing alone, satisfy the prejudice prong of *Strickland*. *Id*. (citing *LaBonte*, 70 F.3d at 1413). To the extent this bit of amplification constitutes an "application" of *Strickland*, it is clearly an objectively reasonable one. *See*, *Williams*, 120 S. Ct. at 1521 (setting "objective reasonableness" as the standard for determining whether the state court decision was an "unreasonable application" of Federal law). As was true in *Hill*, in which it was alleged counsel had misinformed petitioner about parole eligibility, "[P]etitioner's mistaken belief . . . would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted." *Hill*, 474 U.S. at 60. For these reasons, the Court concludes that Petitioner is not entitled to relief on his claim of ineffective assistance related to counsel's prediction of the length of his sentence.

II. Ineffective assistance of counsel – speaking to victim's family

Petitioner asserted in his State post-conviction petition that his attorney was ineffective because she improperly contacted the victim's family. This ground was withdrawn during the state hearing, and the justice accordingly did not address it in his Decision on Post Conviction Review. Petitioner is now barred under state law from bringing the claim in a subsequent post conviction proceeding. 15 M.R.S.A. § 2128(3) ("All grounds for relief from a criminal judgment or from a post-sentencing proceeding shall be raised in a single post-conviction review action and any grounds not so raised are waived . . . .").

This procedural default in the State court prevents Petitioner from raising this claim in this Court absent a showing of "cause and prejudice" or a "miscarriage of justice." *Burks v. Dubois*, 55 F.3d 712, 716-17 (1st Cir. 1995) (citations omitted). Petitioner has made no attempt to assert a

cause for his failure to pursue the claim in the State proceeding. *See*, Petition at ¶ 13. The Court can imagine no miscarriage of justice resulting from this particular allegation. Attorneys routinely interview prosecution witnesses in preparation for trial. Petitioner is not entitled to relief on this ground.

III. Improper sentence under law

Petitioner asserts that the trial judge failed to consider certain mitigating factors in fashioning Petitioner's sentence. The Decision on Post Conviction Review reads on this issue as follows:

> Virtually the only testimony presented by Enman on this point was his statement that he felt the sentence was unduly harsh; that the shooting had been accidental. The transcript of the sentencing hearing indicated the contrary. First, Enman's trial attorney presented a very thorough sentencing memorandum, and both the attorney and Enman, made a point of his growth and sense of loss. (Sentencing Transcript, pp. 30, 32-33). The sentencing comments of the court make it clear that the stressful situation at the time of the shooting was recognized (Sentencing Transcript, p. 38) and that Enman's positive record of employment and accepting responsibility were considered as mitigated factors. (Sentencing Transcript, p. 39). Enman has failed to demonstrate in any way that the sentencing court failed to consider the circumstances surrounding the shooting or Enman's own efforts to rehabilitate himself.

Dec. on Post Conv. Rev. at 4. It is clear from this record that Petitioner is not challenging the exclusion of mitigating evidence, but rather the weight accorded it by the sentencing judge. This allegation is a matter of state law. *State v. Sweet*, 2000 ME 14, 745 A.2d 368, 372-73; *cf.*,

Skipper v. South Carolina, 476 U.S. 1 (exclusion of mitigating factors improper in capital cases). State law errors of this nature are not cognizable in this Petition for Writ of Habeas Corpus. *Burks*, 55 F.3d at 715. Petitioner is not entitled to relief on this basis.

Conclusion

For the foregoing reasons, I hereby recommend the Petition for Writ of Habeas Corpus be DISMISSED, and the Writ DENIED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____
Margaret J. Kravchuk
United States Magistrate Judge

Dated on: May 15, 2000

ADMIN

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-43

ENMAN v. MAINE, STATE OF Filed: 03/09/00
Assigned to: JUDGE GENE CARTER

Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: $0,000 Nature of Suit: 530
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

RICKY LEE ENMAN plaintiff	RICKY LEE ENMAN [COR LD NTC] [PRO SE] 28537 DOWNEAST CORRECTIONAL FACILITY HCR 70 BOX 428 MACHIASPORT, ME 04655
v.	
MAINE, STATE OF defendant	CHARLES K. LEADBETTER 289-3661 [COR LD NTC] ASSISTANT ATTORNEY GENERAL STATE HOUSE STATION 6 AUGUSTA, ME 04333 626-8800